No. 78-108

In the Supreme Court of the United States

OCTOBER TERM, 1978

LINDA CHAPMAN, Administrator of the Estate of MURRELL CHAPMAN, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional and statutory provisions involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Cases:

Adams v. *Montana Power Co.*, 528 F.2d 437	6, 8
Buffalo Bayou Transportation Co. v. *United States*, 375 F.2d 675	6
Coryell v. *Phipps*, 317 U.S. 406	8
Just v. *Chambers*, 312 U.S. 383	8
Kelly v. *Smith*, 485 F.2d 520	8
Lane v. *United States*, 529 F.2d 175	8
Levinson v. *Deupree*, 345 U.S. 648	8
Richards v. *Blake Builders Supply, Inc.*, 528 F.2d 745	8
St. Hilaire Moye v. *Henderson*, 496 F.2d 973	8

Constitution and statutes:

Article III, Section 2	2
Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680	3

Constitution and statutes—Continued	Page
Suits in Admiralty Act, 41 Stat. 525-528, 46 U.S.C. 741-752	3, 6
46 U.S.C. 742	3
28 U.S.C. 1333	2

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-108

LINDA CHAPMAN, Administrator of the Estate of MURRELL CHAPMAN, Deceased, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. A1-A11) is reported at 575 F.2d 147. The initial opinion of a panel of the court of appeals (Pet. App. A22-A30) is reported at 541 F.2d 641, but the revised panel opinion (Pet. App. A12-A21) is unreported. The opinion of the district court on motion for reconsideration is unreported. The original opin-

ion of the district court (Pet. App. A31-A35) is likewise unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on August 20, 1976, and its revised judgment was entered on June 3, 1977. The judgment of the court of appeals *en banc* was entered on May 1, 1978, and was modified on June 9, 1978. The petition for a writ of certiorari was filed on July 19, 1978. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether admiralty jurisdiction extends to a recreational boating accident occurring on waters that, although navigable for purposes of Congress' power under the Commerce Clause, are not now in fact used for commercial navigation, are not susceptible of such use in their present state, and are likely to be used only for recreational activities.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, of the Constitution provides in part:

> The judicial Power shall extend * * * to all Cases * * * of admiralty and maritime jurisdiction.

2. 28 U.S.C. 1333, provides in part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

> (1) Any civil cases of admiralty or maritime jurisdiction * * *.

3. 46 U.S.C. 742, provides in part:

> In cases where if such vessel were privately owned or operated, * * * or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *

4. 28 U.S.C. 1346(b), provides in part:

> * * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Murrell Chapman drowned in the Kankakee River at Wilmington, Illinois, when the 16 foot outboard motorboat in which he was fishing swept over an unmarked sill dam and capsized. His administrator sued the United States under the Suits in Admiralty Act, 41 Stat. 525-528, 46 U.S.C. 741-752, and the Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680, contending that it had a duty to mark the dam (Pet. App. A2).

The dam involved ("Wilmington Dam") lies between the left bank and an island at Wilmington, Illinois, where the river flows north. The United States did not build the dam and has never owned it, maintained it, marked it, or had any other connection with it. The City of Wilmington now owns the dam. The island on which the east end of the dam abuts is a public recreational park. Prior to the accident the dam was marked by barrels placed by the Wilmington Rotary Club, but these markings were not there when the accident occurred. Since the accident, the dam has been marked by buoys placed by the Illinois Department of Conservancy (Pet. App. A2).

The Kankakee River, which joins with the Des Plaines to form the Illinois River a few miles downstream from Wilmington, was not a part of the waterway connecting Lake Michigan and the Mississippi River via the Illinois-Michigan Canal. Running from the Chicago River to the Illinois River at LaSalle, Illinois, the 96-mile canal was built under the authority of the State of Illinois. The right of way for the canal and additional land to be sold to raise money for construction were granted by Congress to the State in the 1820's, but construction was not commenced until 1836; the canal was completed in 1848. It served as an artery of commerce for several decades but became obsolete long before the turn of the century and, according to the Encyclopedia Britannica, has not been used since 1900. The present Illinois Waterway parallels the old canal (*id.* at A2-A3).

The only relationship the Kankakee River had with the Illinois-Michigan Canal was as a source of additional water. To collect the water and divert it to the canal, the State built a dam across the Kankakee a short distance below Wilmington and a feeder canal from that point to the Illinois-Michigan Canal (Pet. App. A3).

There was once some commercial navigation on the Kankakee itself. In 1847 a private company was organized for the purpose of improving navigation and developing water power on that river. Pursuant to authority obtained from the State, that company raised the state dam, built a lock in the feeder canal, and built four additional dams and locks, providing navigation for some distance above Wilmington. One of these four dams was the dam involved in this case (*id.* at A3).

In 1878 and 1879 Congress appropriated money for study and improvements of the Kankakee. In 1915 money was appropriated for flood protection along the river, with the federal government's participation to be based on "the value of protection to navigation." At various times before 1931 Congress authorized construction across the Kankakee of bridges and another dam, and the Army Corps of Engineers issued permits authorizing installation of overhead wires and submarine cables across the river. In 1924 a power company filed with the Federal Power Commission a declaration of intent to build a dam and other works in the river, and the District Corps of Engineers recommended that the river be considered a navigable stream subject to the FPC's jurisdiction.

During the same year the Secretary of War opposed a bill in Congress that would have declared the river to be non-navigable for some 27 miles (which would have included the Wilmington section). Congress did not adopt the bill. In 1932, however, the Army Corps of Engineers, acting through its Division Engineer and the Chief of Engineers, determined that this part of the Kankakee was not navigable, although the Division Engineer's subordinate, the District Engineer, had made a contrary recommendation (Pet. App. A4).

After 1931, at the latest, no commercial vessels of any kind used the Kankakee River, and the federal government exercised no regulatory authority over it. Since that time the river has been used solely for recreational purposes. It is not now usable for commercial shipping (Pet. App. A4).

2. The district court dismissed plaintiff's Federal Tort Claims Act claim because of contributory negligence, but found that the Corps, although it had acted in good faith and had no notice of the hazard, was liable under the Suits In Admiralty Act for failing to mark the Wilmington Dam, pursuant to *Buffalo Bayou Transportation Co.* v. *United States*, 375 F.2d 675 (C.A. 5) (Pet. App. A34). A motion for reconsideration invoking, among other issues, the decision in *Adams* v. *Montana Power Co.*, 528 F.2d 437 (C.A. 9), was denied.

A panel of the court of appeals affirmed on the basis that the United States had granted land for construction of the Illinois & Michigan Canal and granted land for building of the dam in question

(Pet. App. A29). The panel granted rehearing when it was pointed out that the court was referring to the wrong dam. Although the opinion was corrected (Pet. App. A15), the court again affirmed.

On rehearing *en banc* the court of appeals completely reviewed the matter. The full court concluded that the United States' granting of land for the construction of the Illinois & Michigan Canal was not a basis of liability and appellee's counsel did not argue otherwise (Pet. App. A2 and n. 1). The court also decided that admiralty jurisdiction did not apply on waters that were navigable for Commerce Clause purposes but which were not in fact used for commercial navigation and were not susceptible of such use in their present state (Pet. App. A9).

ARGUMENT

1. Petitioner asks this Court to grant a writ of certiorari to "resolve the conflicts and review the scope of the Federal Admiralty Jurisdiction over pleasure boating activity" (Pet. 8). But that general question was not decided below and the present case is not an appropriate vehicle for its consideration by this Court.

What the court of appeals *en banc* held was that (Pet. App. A9):

> * * * a recreational boating accident does not give rise to a claim within the admiralty jurisdiction *when it occurs on waters that, although navigable for purposes of Congress' power under the commerce clause,* * * * *are not in fact used*

> *for commercial navigation and are not susceptible of such use in their present state* [emphasis added].

Indeed, the court *en banc* expressly noted that (Pet. App. A6, n. 10):

> the reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before use.[1]

There is, accordingly, no conflict between the present decision and the cases cited by petitioner, all of which involved the operation of pleasure boats as a traditional maritime activity on waters used for commercial navigation.[2] The instant case merely follows *Adams, supra*, in holding that admiralty jurisdiction is lacking because the waters had become state recreational resources which were not in fact used for commercial navigation and were not susceptible of such use in their present state.

[1] Likewise, the court of appeals in *Adams* v. *Montana Power Company*, 528 F.2d 437 n. 4, 440-441 (C.A. 9), noted that:

> Where commerce moves and the waters are legally navigable, there may be a federal interest in extending admiralty jurisdiction to pleasure craft. See *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973 (8th Cir. 1974).

[2] See *Kelly* v. *Smith*, 485 F.2d 520, 526 (C.A. 5) (rifle fire directed at a vessel "on a major commercial artery"); *Lane* v. *United States*, 529 F.2d 175 (C.A. 4) (navigable waters abutting intercoastal waterway that supported commercial activity); *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973 (C.A. 8) (boating accident on Arkansas River, which supported commercial activity); *Richards* v. *Blake Builders Supply Inc.*, 528 F.2d 745, 747 (C.A. 4) (Lake Gaston had some commercial activity).

So, also, the cases in this Court all involved activities on waters used for commercial purposes: *Levinson* v. *Deupree*, 345 U.S. 648 (crash of two motorboats on Ohio River); *Coryell* v. *Phipps*, 317 U.S. 406 (fire on yacht afloat in commercial storage basin); and *Just* v. *Chambers*, 312 U.S. 383 (injury to persons on yacht while cruising off Miami, Florida).

2. Assuming *arguendo* the correctness of the rule just stated, petitioner nevertheless asserts that the "unique factual situation" presented here justifies a special exception (Pet. 9). But there is no basis for that result.

Petitioner invokes the original panel opinion to the effect that the United States was a "procuring cause of the dam being constructed." That, however, was a factual misstatement. As already noted, the panel itself revised this language on rehearing, when it was pointed out that the opinion had referred to the wrong dam. What is more, the full court expressly addressed this claim and concluded that it was not supported by an examination of the record. The court went on to note that "appellee does not argue to the contrary" (Pet. App. A2). In short, the United States had nothing to do with the Wilmington Dam.[3]

[3] Petitioner also has a suit pending in the Illinois state courts against the City of Wilmington, the owner of the dam involved in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 273213 117